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No. 82-1350

IN THE

Supreme Court of the United States

OCTOBER TERM, 1982

UNITED STATES OF AMERICA, *Petitioner*

v.

UNITED SCOTTISH INSURANCE CO., *Et Al.*,

BRIEF IN OPPOSITION TO PETITION FOR A WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE NINTH CIRCUIT

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QUESTIONS PRESENTED

1. Should not the United States be liable under the Federal Tort Claims Act when the Federal Aviation Administration ("FAA") voluntarily assumes the duty, ordinarily performed by private persons, to inspect a modification of an aircraft and the negligence of the FAA employee assigned to do the inspection is a proximate cause of the subsequent crash of the aircraft and the death of all persons aboard?

2. Whether the discretionary function exception to the Federal Tort Claims Act should shield the United States from liability for the negligence of a FAA employee in failing to carry out his day-to-day duties of inspecting the modification of an aircraft as mandated by the Federal Air Regulation promulgated by the FAA.

3. Are actions against the United States for damages for wrongful death and property damage caused by the negligence of a FAA employee in inspecting and returning to service an aircraft with a dangerously faulty gasoline fueled heater barred by the misrepresentation exception to the Federal Tort Claims Act?

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STATEMENT

On October 8, 1968, a DeHavilland Dove aircraft, owned and operated by plaintiff JOHN DOWDLE caught fire in midair, crashed and burned in Las Vegas, Nevada. The pilot, co-pilot, WEAVER and passenger FLEMING and CEARLEY were killed. The fire, crash and deaths were caused by a faulty fuel line to a gasoline fueled heater located in a compartment below and forward of the pilot's compartment. The heater and fuel line were negligently installed by an aircraft repair station in Dallas, Texas in 1965.

None of the discussion in petitioner's brief relative to the certification of aircraft is relevant to this case except that pertaining to the "supplemental type certificate" provided for in 14 C.F.R. 21.113 *et seq.* If the owner of an aircraft desires to modify the

aircraft, such a supplemental type certificate must be obtained from the FAA. In this case, because it was a one-time modification, no detailed plans or specifications were provided to the FAA. The only "specifications" consisted of polaroid pictures taken of the "as built" installation. Under these circumstances, it is mandatory that an FAA inspector, as distinguished from a private person, inspect the installation and approve the aircraft for return to service. That was done in this case, albeit, negligently.

The fuel line was installed by utilizing a copper fuel line mounted in the belly of the aircraft that had been part of a priming system which was no longer in use. (FF 11)* This copper fuel line was cut at a point just forward of a sloping bulkhead which separated the passenger compartment from the cockpit and forward luggage compartment (located directly below the cockpit). (FF 12) A stainless steel fuel line was coupled to the copper line with a stainless steel junction block. From there the line was led up to the left, along the forward side of the sloping bulkhead to the upper left corner of the rear wall of the forward baggage compartment. There it was clamped and run forward along the ceiling of the forward baggage compartment to a valve attached to the ceiling. (FF 13) From the valve the line was run forward to the combustion heater located in a nose compartment of the aircraft. (FF 14) This line was unsupported or improperly supported for a run of approximately three and one-half feet. (FF 15) It was placed within 1/16" of a stainless steel bolt and nut which could cause a rupture in the line. (FF 17) The existing copper line which was used was not annealed. If copper tubing is not annealed, stress concentrations created when it is formed create points where subsequent vibra-

*FF = Findings of Fact 1975 — First Trial

tion can lead to fracture and catastrophic failure. (FF 18) The stainless steel line was free to vibrate with a fore and aft motion of approximately three inches from center in each direction and an additional horizontal motion along the face of the sloping bulkhead. This vibrational excursion was greatly in excess of that permitted by Federal Aviation Regulations, and could have been eliminated by the proper use of clamps. (FF 19)

The heater installation exhibited numerous design deficiencies which should have alerted any reasonably competent FAA inspector to the fact that the overall quality of the design and fabrication was not consistent with FAA regulations and standards. (FF 21) The heater installation was unairworthy. (FF 22) The fire was caused by an escape of fuel from the heater fuel line because of the failure of that line along or just below the forward wall of the sloping bulkhead due to metal fatigue or chaffing caused by excessive vibrations of the fuel line. (FF 25, 26)

After the heater line was installed along the sloping bulkhead separating the forward baggage compartment and the afterpart of the aircraft an aluminum skin was placed over this bulkhead. The line was therefore not visible to subsequent mechanics or inspectors and subsequent inspections did not require the removal of this skin. It is impossible, uneconomical, unreasonable and unfeasible for an owner of an aircraft inspected and certified by the Federal Aviation Administration to take down the entire airplane and inspect it completely. Subsequent inspections are done only to the extent required by the Federal Air Regulations. Although the United States continues to suggest that such inspections took place there is here no finding whatsoever that those inspections altered or modified the aircraft in any way or that they contributed in any way to the accident and certainly not that they were such an independent intervening cause of the accident so as to

relieve the United States from the liability for the negligence of the FAA inspector.

If the FAA inspector had properly inspected the heater installation in accordance with FAA regulations, the aircraft repair station would have been required to either remove the installation because it was unairworthy or to modify the installation to correct the excessive vibration of the fuel line, use of dissimilar metals and other defects so as to make the installation airworthy. In either case, the accident at issue herein would not have occurred if a non-negligent, proper inspection had been made. (FF 27) The negligence of the FAA inspector was a proximate cause of the inflight fire, crash and death of plaintiffs' decedents. (FF 29)

REASONS FOR DENYING THE PETITION

The United States argues that this Court should grant its petition for certiorari and reverse the decision below because the Court of Appeals' interpretation of the Federal Tort Claims Act cannot be limited to aircraft litigation. It then raises bogeyman questions of unlimited and staggering liability by reciting other areas in which the government may have a regulatory function. We would assume that whether or not there would be liability in any of those other areas would depend on the law, regulations and facts in each instance just as this case depends on the law regulations and facts in this single instance. Courts have little difficulty in distinguishing one activity from another or one case from another.

But even if the government was correct in its contention, the solution is not for the courts to back away from their duty to render a proper decision under the existing law but for Congress to change that law or the agency to promulgate other regulations. The Federal government herein has voluntarily assumed certain

obligations and duties by the passage of the Federal Aviation Act of 1958 and its predecessors and by the Federal Air Regulations promulgated pursuant to that Act. These voluntary assumptions of duty, at least under the Good Samaritan Rule as applied in California and Texas, carry with them the obligation to perform those duties with due care or be liable as would a private party for injuries and damages resulting from lack of due care.

The reasoning of the government is circular in nature. It says "This activity falls within a regulatory function of the government." It then says "Since this activity falls within a regulatory function of the government, it is not an activity that could be carried out by private persons. Therefore, since no private person could be held for this activity, the United States cannot be held liable either." This reasoning might apply to the promulgation of regulations. But we are not complaining about the failure of the United States to pass proper regulations, more stringent regulations or any regulations. The sole claim is that an employee charged with the day to day duty of carrying out regulations properly promulgated was negligent in doing so.

The reasoning, however, is invalid when applied to the inspection of machinery. It has long been the law of California that a person whose negligence in failing to properly inspect machinery may be held liable to individuals injured as a result of that negligence. See *Dahms* v. *General Elevator Co.*, 214 Cal.733 (1932).

1. The Court of Appeals after the first appeal returned this matter to the District Court for further findings. The Court of Appeal had concluded that courts may not determine governmental liability without considering the liability of a private person in "like circumstances" pursuant to relevant state law. The District Court then conducted an extensive trial and found that prior to the passage of Federal legislation all inspections were

conducted by private persons. The government concedes in its brief that even after the United States had attempted to pre-empt the field most inspections are conducted by private persons.

Petitioner in its brief states, "The Court of Appeals acknowledged that no private person assumes responsibilities in any way comparable to those of the FAA." (See App. A, *infra*, 3a)" Petitioner's Brief, p. 15. This gross misstatement of the record cannot be left unchallenged. The Court of Appeals made no such acknowledgment in its opinion. It affirmed the judgment of the District Court which expressly found that the inspection of aircraft is not a uniquely government function but rather one which was traditionally performed by private persons. In fact, the government itself admits in its brief (page 4) that most inspections are still conducted by private persons.

Prior to the government entering into the aviation field in 1927 with the passage of the first Air Commerce Act, aircraft were being manufactured, modified, altered, repaired and inspected by private persons in the United States. As in all other fields, they were liable for negligence in any one of those activities to anyone injured by such negligence. Following the passage of the first Air Commerce Act, the government in 1931 promulgated the first regulations involving alterations and repairs to licensed aircraft. The role of the United States in pre-empting the field of aviation with regard to the inspection and certification of aircraft is similar to the take-over of the control tower operations by the United States. The question as to whether or not the United States could be held liable for the negligence of its employees in operating control tower now appears clear. But, in the early cases the United States insisted that its tower operators performed governmental functions of a regulatory nature, that no private individual had such power of regulations, that

therefore the Federal Tort Claims Act did not permit suit based on negligent performance of their duties. Such contentions have uniformly been rejected by the courts in the control tower situation. *Eastern Airlines* v. *Union Trust Company*, 221 F.2d 62 (D.C. Cir. 1955), *aff'd. sub. nom., United States* v. *Union Trust Company*, 350 U.S. 907 (1955); *Ingham* v. *Eastern Airlines, Inc.*, 373 F.2d 227 (2nd Cir. 1967). Here, as in the air controller cases, the United States has taken over voluntarily a function which had previously been conducted by private persons. In fact, unlike the air controller cases, here the function is still being carried on in great part by private persons.

The government having voluntarily assumed a duty, the breach of which would create liability on a private person, is liable when one of its employees negligently fails to carry out that duty. Those cases cited by the United States, such as *Raymer* v. *U.S.*, 660 F.2d 1136 (6th Cir. 1981), do not hold to the contrary but merely hold that there has been a failure of proof of one of the elements necessary to hold the government for a Good Samaritan assumption of duty and breach thereof. In the *Raymer* case, for example, there was a failure to prove reliance. In the instance case, reliance was specifically found by the court.

2. Petitioner's brief complains that the Court of Appeals, "engaged in only the most cursory examination of the discretionary function . . . exception to the Tort Claims Act . . ." However, the United States thought so little of the discretionary function exception defense that it abandoned this defense in the first appeal of these cases. On that appeal in Appellant's Reply Brief, page 3, it is stated:

> The case of *Duncan* v. *United States*, 355 F.Supp. 1167 (D.C. 1973) is also inapposite when related to the contentions of the United States. The *Duncan* court merely ruled the United

> States had no viable defense in the 'discretionary function' exception to the Federal Tort Claims Act. 28 U.S.C. §2680(a). *Nowhere on appeal has the United States argued that the discretionary function exception applies in the instant action.* (Emphasis added).

Even though the discretionary function exception was not argued in the first appeal, the Court of Appeals sent the matter back for determination of the application of the Good Samaritan Rule with the statement:

> When the regulations implement only Good Samaritan conduct of the government, we do not believe that liability should be predicated upon violation of regulations alone. At the same time, such regulations or statutes may create a 'duty' such that the government may not take advantage of the 'discretionary function' exception of the Act. 28 U.S.C. §2680(a). See *United Airlines, Inc.* v. *Wiener*, 335 F.2d 379, 395 (9th Cir.), Cert. Dismissed, 379 U.S. 951 (1964). *United Scottish Insurance Co.* v. *United States* (1979) 614 F.2d p. 188.

Thus, while a cause of action would not lie against the FAA for failing to enact more stringent safety requirements herein, the enforcement of the existing safety inspection certification regulations is operational level conduct for which the FAA may be held liable. Once formulated, the regulations in the manual used by the FAA inspector, of which judicial notice has been taken, establish a well-defined "duty" for aviation inspectors that is not logically included under the definition of discretionary function.

Among the decisions distinguishing between policy decisions and operational tasks are those rejecting the discretionary function defense in the air controller cases. *Eastern Airline, Inc.* v. *United Trust Co.*, 221 F.2d 62 (D.C. Cir. 1955); *United States* v. *Furumizo*, 381 F.2d 62 (9th Cir. 1967); *Ingham* v. *Eastern Airline, Inc., supra; Stork* v. *United States*, 430 F.2d 1104 (9th Cir. 1970). A task is discretionary if it involves judgment, planning, or policy decisions. It is not discretionary when it involves enforcement

or administration of a mandatory duty at the operational level. There is no discretion in this matter. In this case, the FAA inspector was *required* to inspect the heater installation. His manual and the regulations which the District Court found violated *required* him to view the installation and compare it with the regulations and standards. He failed to do so properly. This is negligence at the operational, not the planning, level.

Thus, even if the discretionary function exception was not waived by the United States in the first appeal it clearly does not apply to the facts of this case.

3. The United States argues that the misrepresentation exception to the Federal Tort Claims Act, 28 U.S.C. 2680(h) bars recovery in this case even though the acts of the inspector were negligent. It suggests that the reasoning of the Court of Appeals herein was inconsistent with this Court's decision in *United States* v. *Neustadt*, 366 U.S. 696, 706 (1961). It points out that the Court of Appeals relied heavily on *Neal* v. *Bergland*, 646 F.2d 1178, 1183-1184 (6th Cir. 1981), cert. granted No. 81-1494. Because of *Neal* they state that the Court may wish to hold this petition pending the decision in *Neal*. We would assume that with the decision in *Block, etc., et al.* v. *Neal*, U.S. 81-1494, decided March 7, 1983 the United States will feel bound to abandon this contention on appeal.

This case, like *Neal*, does not focus on the government's failure to use due care in issuing an airworthiness certificate but rather on the government's breach of another duty. In this case, the District Court and the Court of Appeals found that the FAA voluntarily undertook to inspect the heater installation in the aircraft, that the FAA inspector failed to use due care in carrying out his inspection activity and that the plaintiffs suffered injury proximately caused by the FAA's failure to use due care.

In this case also, unlike *Neustadt,* the government's misstatements are not essential to plaintiffs' negligence claim. The Court of Appeals in *Neal* found that to prevail under the Good Samaritan doctrine, Neal must show that Government officials voluntarily undertook a duty; that they failed to use due care in carrying out this activity and that she suffered some pecuniary injury proximately caused thereby. In this case, the District Court *has found* and the Court of Appeals has affirmed that the FAA assumed a duty to inspect the installation; that the official failed to use due care in his inspection activity and that the plaintiffs herein suffered injury thereby.

While in *Neal* the plaintiff will now be able to show that the house would not have been turned over to her in a defective condition if the government officials had carried out their duties, the plaintiffs herein have already successfully proved that the aircraft would not have been in service and the injuries and damages herein complained of would not have been incurred if the government official involved had carried out his duties with all due care.

The misrepresentation defense has been asserted by the United States in many cases involving death, injury or property damage incurred in aviation accidents. In *Wenninger* v. *United States,* 234 F.Supp. 499 (D.C. Del.1964); *Ingham* v. *Eastern Airlines, Inc., supra; Murray* v. *United States,* 327 F.Supp. 835 (D.C. Utah 1971); *United Airlines, Inc.* v. *Wiener,* 335 F.2d 379 (9th Cir. 1964) the courts rejected the government's arguments that it was shielded from liability for failing to warn that air space was used by military aircraft, failure to convey weather information, negligently publishing and distributing aeronautical charts which falsely indicated that runway lighting was available, and failing to inform a civil air carrier of the details of the government's hazardous activities. In each of these instances the court indicated

that the gravamen of the actions was not misrepresentation but the negligent performance of operational tasks even though such negligence consisted partly in a failure of a duty to warn.

We would hope that *Block* will once and for all have distinguished the duty of the government to carry out the underlying task and the inapplicability of the misrepresentation defense to that duty from cases such as *Neustadt*. Clearly, here, plaintiffs relied not on a document which most of them had never seen but, as held by the District Court, on the proper performance of the duty to inspect.

CONCLUSION

The petition for a writ of certiorari should not be granted. The decision of the Court of Appeals was a correct application of well-established law in accord with mainstream decisions of other courts and presents no unique question requiring resolution by this Court. This Court's decision in *Block* v. *Neal* resolved any remaining doubt about the applicability of the misrepresentation defense. The discretionary function defense was abandoned and clearly does not apply. The courts below have correctly applied the Good Samaritan rule to the facts of this case.

DATED: April 14, 1983.

Respectfully submitted,

/s/

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